



# PERSONAL INJURY ARBITRATION

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# THIS IS A TALK

- About arbitration
- How it could be a useful tool for those in this room
- How we might create a great service
- Advantages and Disadvantages
- Of Arbitration
- And of litigation

# WHAT DOES ARBITRATION MEAN?

- Simple method of resolving disputes
- Disputants agree to submit their disputes to an individual
- Whose judgement they **both** trust
- Each puts their case to this person
- The Arbitrator
- He or she listens, considers and makes a decision
- It is final and binding

# IS IT NEW?

- Arbitration stretches back to medieval Scots Law
- The rules were derived from thirteenth-century canon law
- But law changed in 2010
- Arbitrators not arbiters



# 2010 ARBITRATION (SCOT) ACT

- Great piece of legislation
- World wide plaudits
- It is based on the Model Law
- UNCITRAL
- United Nations Commission on International Trade Law
- It is an improvement on the 1996 Arbitration Act in England & Wales
- Which is seen as a world leader

# ARBITRATION AGREEMENTS

- Clause at the end of a Commercial Contract
- In the event of a dispute the parties agree to arbitrate
- In Edinburgh under the Law of Scotland
- With a member of the Faculty of Advocates to be appointed
- By agreement or by the Dean of the Faculty

# ARE SUCH AGREEMENTS BINDING

- Yes
- If the parties agree to arbitrate
- Then to arbitration they must go

# AGREEMENT TO ARBITRATE AFTER THE EVENT

- Submission Agreement
- Free to agree what you like
- Exciting feature of arbitration
- Limited only by your imagination



# WHAT DO WE MEAN BY THAT?

- You can duplicate litigation
- Everything in dispute
- Have a proof and pleadings
- Or think of another way
- Examples



# DISPUTE ON LIABILITY

- Are the facts much in dispute?
- Do you need to hear from witnesses?
- What about simply lodging statements?
- A hearing with submissions?
- Or written submissions and off to Arbitrator

# QUANTUM

- Do you need witnesses?
- Do you need medical witnesses?
- You don't have to decide
- You can ask the arbitrator if he needs them
- Do you need submissions?
- Do you need a valuation?

# QUANTUM

- Do you actually need a decision on value?
- What about agreeing to assess the future
- and the likelihood that will need care
- Or will be able to earn
- Or be promoted



# ITS NOT A MEDIATION

- Arbitrators act under the law of arbitration
- But they apply the law of the dispute
- An arbitrator is not deciding on the basis of what is fair
- (Although that can be legally agreed)
- He is doing so as an expert in liability law – the Law of Scotland

# SO IS LITIGATION NO GOOD?

- We are litigators
- Litigation and access to litigation are important to us all
- More than that it's a vital part of a modern democracy
- It will continue
- Although it might be improved

# ISSUES WITH LITIGATION

- For a while after the Coulsfield reforms
- Scotland was fastest system in Europe
- Now more than 4 days
- 2 year delay
- Hopefully that can be improved

# ISSUES WITH JUDGES

- Continuity of approach
- So much depends on who you get
- You wont find out till the day or week before
- You can ask for a case to be allocated early



# CHOICE OF ARBITRATOR

- Arbitrators want to be instructed again
- They have to be wholly independent and unbiased
- They have to disclose all connections to the parties and the case
- They will have to be fair to both sides
- Their decisions will have to be comprehensive and reasoned

# DO I NEED A QUALIFIED ARBITRATOR?

- The crucial element is trust
- Suggest what you need in PI arbitration is expert in PI
- Faculty group have qualification in arbitration law see website
- Some have further qualifications or experience
- Some few have experience as an arbitrator
- We are developing an electronic arbitration service
- The clerks are being given special instruction
- We will look after you

# TIME FOR DECISION TO BE ISSUED

- What is the longest you have waited for a decision?
- With arbitrators guess what?
- You decide how long
- And given finality of the decision
- That's it
- 14 days for a decision?

# ARBITRATION TIMESCALE

- The parties are free to decide
- Arbitrators will be prepared to sit when they have availability
- If the issue is involved then may be better to have case management meeting
- To decide how best to proceed and what the arbitrator might need
- But stress that you can decide all of that
- You and your opponents may need time to prepare the strongest case



# CONFIDENTIALITY WHAT DO WE WANT?

- Do we want publicity?
- Does the pursuer want publicity about receiving a large award?
- Do the defenders (particularly doctors) want publicity about allegations of fault, even if ultimately unproven?

# CONFIDENTIAL OR NOT

- Arbitral proceedings are typically confidential
- Can't publish the result
- Can't even say you have arbitrated
- Unless you agree in advance or after the event that you can
- What if there was a power in some cases to publish?
- Full or skeletal details
- With or without parties being named

# CAN YOU APPEAL?

- Final and binding
- But depends what parties want
- Three arbitrator appeal?
- For getting something plainly wrong?
- Remember the corollary advantage is finality of litigation

# EXPENSES

- To a large extent this is a matter for you
- What would you want?
- What would your clients want?
- Its reasonably common to give the arbitrator a discretion about this
- Be assured there are opportunities here for all



# OPPORTUNITIES LIKE WHAT?

- **For Pursuers justice achieved in 3 months?**
- **For Insurers case off the books within 3 months?**
- **With no risk of adverse publicity**
- **Or setting a dangerous precedent**
- **Cheaper than litigation or parties can make it so**
- **Fees to be paid?**
- **A matter of agreement**
- **And that's just what we think – you are the expert business people**

# COSTS

- The arbitrator's fees
- Accommodation for the proceedings (if there is to be a hearing)
- Witness expenses
- Other costs, there needn't be any

# NEW COURT COSTS

- Outer House
- Each party pays £200 per half hour
- So £4,000 per day
- Plus earlier lodging costs etc
- Inner House twice that!

# DO I NEED TO STUDY ARBITRATION LAW?

- Can if you want
- But its enough that your arbitrator has sufficient knowledge
- Its his job to achieve consensus going through the process
- Not everything has to or can be agreed at the outset
- So the process is consensual throughout
- Be aware the Law Society Guidance
- Arbitration should form part of advice





WHEN CAN WE START?

- As soon as you can agree to do it!

# TYPES OF ARBITRATION

- • Personal Injury Arbitration
- • Professional Negligence Arbitration
- • Agricultural Arbitration
- • Property Arbitration
- • Family Arbitration
- • Equine Arbitration
- • Commercial Arbitration

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COMPASS CHAMBERS

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